90-484

No. _____

IN THE

Supreme Court of the United States

October Term, 1990

BILL TABER, D/B/A
TABERS GRASS FARM
Petitioner

v.

JAMES C. PLEDGER, DIRECTOR
ARKANSAS DEPARTMENT OF
FINANCE AND ADMINISTRATION
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are the petitioner's due process rights for "an opportunity to contest the validity of the tax," recently reaffirmed by this Court in its *McKesson*[1] decision, being denied to this taxpayer by the express refusal of the Arkansas Supreme Court to exert subject matter jurisdiction over this controversy and to accept, as controlling, in this case, this Court's ruling in its prior *Flora*[2] decision (i.e. to allow a judicial review of a contested and retroactively assessed "divisible" excise tax after a partial payment of the contested tax for only some of the taxable periods in question (rather than *only* after a full payment of all such state excise taxes assessed for all taxable periods covered by the examination.)?

2. Does Arkansas' statutory and constitutional scheme of tax procedure (as interpreted by the Arkansas Supreme Court in this case) deny the petitioner his due process guaranteed right to a speedy and meaningful post-deprivation judicial review of a contested Sales Tax assessment that he paid under both duress and protest?

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1. McKesson Corporation v. Division of Alcoholic Beverages & Tobacco, – U.S. –, 110 S.Ct. 2238 (1990).

2. Flora v. United States, 362 U.S. 145, 80 S.Ct. 630 (1960).

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Bill Taber respectfully petitions this Court to issue a Writ of Certiorari to review the judgment of the Supreme Court of Arkansas in this case.

OPINIONS

The opinion of the Supreme Court of Arkansas (App. A, *infra*, 1a) is reported at 302 Ark. 484, 791 S.W.2d 361. The Opinion (App. B, *infra*, 10a) of the Honorable Ellen B. Brantley, Chancellor, Pulaski County Chancery Court, Fifth Division, is unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas (App. A., *infra*, 1a) was rendered on June 18, 1990. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution:

Amendment 14 §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Arkansas Constitution:

Article 16 §13. Illegal Exactions.

Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exactions whatever.

Statutes:

The applicable provisions of the Arkansas Tax Procedure Act (Ark. Code Ann. §§26-18-405, 406, 507 and 701) and the Arkansas Gross Receipts Tax Act (Ark. Code Ann. §26-52-301) are set forth in detail as Appendix C, *infra*, 13a.

STATEMENT OF THE CASE

The Petitioner, Bill Taber, is an Arkansas farmer who is engaged in the business of growing and selling sod. From the early 1970's through the end of the period in suit, the Petitioner's only sales of sod were made by him directly from his farm, since he did not have any delivery vehicles of his own. The Petitioner's sales of sod were made to two types of customers. First, he sold cut sod to the owners of retail sod lots who picked up the sod in their vehicles at his farm, and, second, he sold sod directly to consumers who picked up the sod at his farm in their vehicles and used the sod for their own purposes.

Based upon the longstanding advice of his accountant, the Petitioner did not charge Arkansas' state or local Sales Taxes upon these sales of sod made directly from his farm, because he had been advised that such sales came within either the statutory exemptions from Arkansas Sales Tax that are provided for the sale of "raw farm products" sold to consumers directly from the farm (Ark. Code Ann. §26-52-401(19)(C)) or for "sales for resale" (Ark. Code Ann. §26-52-401(12)(A)).

In the summer of 1986, Mr. Taber decided to open

his own retail sod lot and he leased space located away from his farm for such purpose. Realizing that sales of sod made from an off-the-farm retail sod lot would not be eligible for the exemption from Sales Tax for the sale of "raw farm products," Mr. Taber applied to the Sales and Use Tax Section of the Arkansas Revenue Division for a Sales Tax permit number for this retail facility. As a result of his application, the Petitioner was granted a permit number, but the Revenue Division's personnel also instituted an audit of his financial records for the prior six years because of his disclosure to them that he had been selling sod from his farm for a number of years.

As a result of this audit, the Revenue Division determined that all of the Petitioner's sales of sod to retail sod lots had been exempt as "sales for resale." However, the auditor proposed to make a retroactive assessment of state and local Sales Taxes for each of the 72 reporting months making up the prior six-year period, i.e. September 1, 1980, through August 31, 1986. The proposed assessment of these Sales Taxes was for a total of $18,028.72, plus accrued interest, that the auditor calculated were attributable to sales of sod that Mr. Taber had made directly from his farm to consumers during each of the 72 separate months covered by this audit period.

Though there was a total of $18,028.66 in state and local Sales Taxes that the auditor proposed be assessed against the Petitioner, the auditor's report clearly sets forth that this total was composed of separate amounts of state and local Sales Tax that were computed for, and were attributable to, each of the 72 separate months of

this audit period.[3]

A formal Notice of Proposed Assessment dated October 30, 1986, was mailed to the Petitioner by the Revenue Division representatives. Pursuant to the applicable provisions of the Arkansas Tax Procedure Act,[4] the Petitioner timely protested this proposed assessment of state and local Sales Taxes to the Revenue Division's Office of Hearings and Appeals, where an administrative hearing was held before an Administrative Law Judge in May of 1986. An Administrative Decision was rendered in this matter a year later in April of 1988 upholding the proposed assessment of Sales Taxes in its entirety. Mr. Taber then timely filed a written request for revision of this Administrative Decision with the Commissioner of Revenues, pursuant to the provisions of Ark. Cod Ann. §26-18-405(d)(4)(A), requesting the Commissioner of Revenues to abate all of the proposed assessment of state and local Sales Taxes. By letter dated August 19, 1988, the Commissioner of Revenues refused the Petitioner's request and notified the Petitioner that his administrative remedies had been exhausted.

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[3] Arkansas' Gross Receipts Act provides that each vendor-collector of these state and local Sales Taxes must file a report and remit the taxes collected for each month by the end of the month following. See, Ark. Code Ann. §26-52-501.

[4] Ark. Code Ann. §26-18-101, et seq. See, in particular, the administrative protest provisions (Ark. Code Ann. §26-18-405), the judicial review of contested assessments (Ark. Code Ann. §26-18-406), the claim for refund provisions (Ark. Code Ann. §26-18-507), and the tax lien and summary collection provisions (Ark. Code Ann. §26-18-701), infra, Appendix C, 13a.

Thereafter, on August 23, 1988, a final assessment of the state and local Sales Taxes was made by the Arkansas Revenue Division, pursuant to the provisions of Ark. Code Ann. §§26-18-401 and 405(d)(4)(B), and a Notice of Final Assessment and Demand for Payment in the total amount of $26,048.66 was mailed to the Petitioner.

Since Mr. Taber had vigorously contested the proposed retroactive assessment of Sales Taxes for more than two years at the administrative level, he sought to pursue a judicial review of the matter to get a judicial determination of whether or not he was entitled to claim the benefits of the statutory exemption from Sales Tax that are provided for the sale of "raw products" made directly from the farm.[5] However, during the two years that this disputed matter was under administrative review, Mr. Taber suffered financial reversals that simply made it impossible for him to pay the full $26,048.66 of the assessment to the Respondent or to secure a corporate surety bond in the amount of twice the total tax assessed. These actions are required by the provisions of the Arkansas Tax Procedure Act to give the Chancery Court a jurisdictional basis upon which to act.[6]

Within the period of time provided by the Arkansas

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[5] It is undenied by the Respondent that, if the Petitioner is entitled to the claimed exemption for the sale of "raw farm products," then there is no Sales Tax whatsoever due from the Petitioner for the entire six-year audit period.

[6] See, Ark. Code Ann. §26-18-406, Appendix C, infra, 13a.

Tax Procedure Act for posting bond, the Petitioner formally offered to post a "property" bond with the Respondent in an amount in excess of twice the total amount of state and local Sales Taxes that had been assessed against him. In October of 1988, the Respondent formally refused Mr. Taber's offer to post a property bond, and the Respondent demanded full payment of the entire assessment of state and local Sales Taxes; the filing of a letter of credit; the posting of a corporate surety bond; or the delivery of a Certificate of Deposit in double the amount of all of the state and local Sales Taxes that had been assessed. The Petitioner was unable to arrange for financing to acquire sufficient funds to cover the total amount of the assessment of Sales Taxes demanded by the Respondent or to arrange for a corporate surety bond in the amount requested, even though he attempted in good faith to secure such a corporate surety bond or to borrow the funds to pay the total assessment.

Thereafter, on November 22, 1988, the Respondent's agents filed a Certificate of Indebtedness (tax lien) against the Petitioner in the Pulaski County Circuit Clerk's Office in the amount of $26,048.66. On or about December 22, 1988, the Respondent's agents caused a Writ of Execution to be issued by the Pulaski County Circuit Clerk to the Pulaski County Sheriff, ordering the Sheriff to seize and sell all of Mr. Taber's property to satisfy the total amount of disputed state and local Sales Taxes that had been assessed for the entire six-year period. This Writ of Execution was served personally upon the Petitioner, along with a Demand Notice, on or about December 28, 1988.

Later, the Petitioner received notice from a Sheriff's Deputy that he would seize and sell all of his property, unless some action was taken to enjoin the Sheriff from such action before February 22, 1989. The Petitioner, on February 13, 1989, paid "under protest" a total of $360.00 to the Respondent, specifically designating (in writing) that $5.00 of this total amount should be allocated and applied to both the state and local portions of the Sales Taxes assessed against him from each one of the 72 months covered by the audit period. On that same date, February 13, 1989, the Appellant instituted suit in the Pulaski County Chancery Court to recover the funds that had been paid "under protest" and to secure an abatement of the balance of the assessment. At the same time, the Petitioner sought and secured a Temporary Restraining Order (TRO) from the trial court Chancellor against the Pulaski County Sheriff's seizure and sale of his property to satisfy the disputed Sales Tax assessment.

In the Chancery Court, in response to Mr. Taber's Complaint, the Respondent filed a Motion to Dismiss, alleging that the Pulaski County Chancery Court did *not* have "subject matter jurisdiction" over the case. The Respondent asserted that Mr. Taber had allegedly failed to fully comply with the "protest" provisions of the Arkansas Tax Procedure Act by either (1) making full payment of the total amount of all the Sales Taxes assessed for all 72 months, or (2) posting a satisfactory bond in double the amount of the total Sales Tax assessed. The Petitioner opposed this Motion to Dismiss.

After a hearing was held on the Respondent's

Motion to Dismiss, and before the Chancellor in the trial court ruled on this motion, the Petitioner filed a Claim for Refund with the Respondent, pursuant to the provisions of Ark. Code Ann. §26-18-507, Appendix C, *infra*, 13a, requesting and demanding a refund of the entire amount of $360.00 that had been paid "under protest" by the taxpayer on February 13, 1989. Subsequently, the Appellant has made two additional payments to the Respondent, designating in writing that his payments be specifically applied to outstanding assessments of Sales Tax and accrued interest, so as to fully pay a total of 13 of the 72 months covered by the six-year audit period. At the time of the payment of these additional amounts, Mr. Taber simultaneously filed additional "Claims for Refund" with the Respondent, under the Claim for Refund provisions of the Arkansas Tax Procedure Act.

The next day, March 16, 1989, the Petitioner filed a Motion to Amend Complaint in the Pulaski County Chancery Court, requesting the Chancellor's permission to amend his original Complaint for the express purposes of also raising additional jurisdictional grounds for the court based upon: (1) the claim for refund provisions of the Arkansas Tax Procedure Act and (2) the "common law" right to recover "involuntarily" paid taxes (writ of assumpsit) as alternative jurisdictional bases (to the previously cited provisions of the Arkansas Tax Procedure Act and the "illegal exaction" provisions of the State Constitution, Art. 16 §13, *supra)* to provide the trial court with "subject matter jurisdiction" in this action. Though the Respondent opposed this Motion to Amend, the trial court Chancellor allowed the Petitioner to file such amendment, and a First Amended Complaint was

filed by Mr. Taber on April 10, 1989, asserting these additional bases for the trial court's jurisdiction.

On October 12, 1989, more than six months after the Petitioner had filed his claims for refund with the Respondent, a hearing was held before the trial court Chancellor on the Respondent's Motion to Dismiss the Appellant's First Amended Complaint. This second Motion to Dismiss was again based upon the "allegation" that the court lacked "subject matter jurisdiction," because of the Petitioner's failure to make full payment of the amount of Sales Taxes, plus accrued interest, that had been demanded by the Respondent for the entire 72 months of the audit period. The Chancellor granted the Respondent's Motion to Dismiss, without prejudice, and entered an order to this effect on October 30, 1989. (Appendix B, *infra*, 10a).

The Petitioner appealed this Order of Dismissal to the Arkansas Supreme Court, urging this appellate court to find that the trial court had "subject matter jurisdiction" over the dispute he had with the Respondent based, alternatively, upon (1) his right to contest a final decision upholding a deficiency (Ark. Code Ann. §26-18-406, *infra);* (2) the claim for refund provisions (Ark. Code Ann. §26-18-507, *infra),* (3) a citizen's right to prevent an "illegal exaction" from being imposed upon himself and other similarly situated taxpayers (pursuant to Arkansas Constitution, Art. 16 §13, *supra,* and (4) pursuant to the taxpayer's rights at common law to recover *involuntarily* paid taxes (i.e. suit on a writ of assumpsit).

Considering each of the taxpayer's arguments for "subject matter jurisdiction," the Arkansas Supreme Court, in an opinion filed on June 18, 1990, affirmed the Chancellor's dismissal of the action for lack of subject matter jurisdiction (Appendix A, *infra*, 1a. The Arkansas Supreme Court refused to find that there was "subject matter jurisdiction" for the thirteen (13) months' worth of these Sales (excise) Taxes that had been paid "under protest" by the Petitioner as "divisible portions" of this total assessment.

Though the Arkansas Supreme Court specifically acknowledged that this Court had decided, in the case of *Flora v. United States*, 362 U.S. 145, 175 fn. 37-38, 80 S.Ct. 630, 645-646, fn. 37-38 (1960), that an *exception* to the general rule that the taxpayer must make "full payment" of any assessed tax before such taxpayer may sue for refund of these taxes in court would be applied to the assessment and payment of "divisible" excise taxes, the Arkansas Supreme Court refused to accept this Court's directive on this issue and refused to rule that these state Sales Taxes were "divisible" taxes for purposes of the chancery court's "subject matter jurisdiction." Instead, the Arkansas Supreme Court held that the "protest statute" method (Ark. Code Ann. §26-52-406, *infra)* of disputing a tax assessment was the "exclusive" method available to this taxpayer; that the "claim for refund" provisions of the Arkansas Tax Procedure Act were unavailable to this taxpayer; and that the Arkansas court had no authority to invoke the "divisible" tax scheme approved by this Court in its *Flora* decision.

Secondly, the Arkansas appellate court noted that

Mr. Taber had paid the entire amount of disputed Sales Taxes, plus interest, for thirteen (13) separate months of the seventy-two (72) month audit period, had filed claims for refund, and that six months had passed without action being taken by the Respondent on such claims. However, the Arkansas court held that the claim for refund provisions of the Arkansas Tax Procedure Act (Ark. Code Ann. §26-18-507, Appendix C, *infra*, 13a) did not apply to the Petitioner's claims in this case, and that the Petitioner was restricted by statute to contesting this assessment through the provisions of Ark. Code Ann. §26-18-406, as his "exclusive" method of contesting the Respondent's assessment.

Thirdly, the Arkansas Supreme Court, after a careful analysis, determined that the provisions of Art. 16 §13 of the Arkansas State Constitution (which allows any citizen to institute an action to enjoin an "illegal exaction") would not provide subject matter jurisdiction in this dispute, because the taxpayer was not alleging that the underlying Sales Tax was illegal or unconstitutional. Rather, the court found that the taxpayer was claiming a total exemption from the sales Tax, and, even though the application of the exemption would have eliminated all of the Sales Tax assessment, that the constitutional provision alleged as an additional jurisdictional basis by the Petitioner was inapplicable to this type of claim.

Finally, the Arkansas court found that the taxpayer was not entitled to institute suit under a "common law" right to recover *involuntarily* paid taxes. The Arkansas court specifically held that its denial of any right to recover under the statutory scheme created by the

Arkansas Tax Procedure Act would not deny him his rights to due process under the laws pursuant to the Fourteenth Amendment of the United States Constitution. The court below found that the "common law" right to sue "to recover money had and received" had been superseded by the provisions of Ark. Code Ann. §26-18-406, and that the statutory provision provided the "exclusive method" for challenging a deficiency determination by the Respondent's agents.

Though noting that the members of the Arkansas Supreme Court were "sensitive to and fully appreciative of" Mr. Taber's position that, with respect to a taxpayer who can neither make full payment nor post the required bond, the Respondent has "confiscatory" power, the Arkansas court held that the Respondent may be able to foreclose his tax lien on the Petitioner's property with no judicial review of Mr. Taber's claim to the Sales Tax exemption. The Arkansas Supreme Court's decision closes with the statement:

> While we are sympathetic with a taxpayer in Taber's position, we cannot say he has demonstrated that the Due Process Clause entitles him to pursue his claim in a court.

Thereafter, the Arkansas Supreme Court mandate was issued and costs were assessed against the Petitioner in the court below. This filing of a Petition for Certiorari on behalf of the Petitioner, then followed the denial by the Arkansas Supreme Court of his claim that his right to the Due Process of the laws had been violated by his being unable to contest the Sales Tax assess-

ment without *full payment* of all amounts of Sales Tax and interest assessed for *each* of the 72 separate months comprising the audit period.

It is most interesting to note for the record that another sod farmer, Coy Mack Boyd of Jonesboro, Arkansas, during the pendency of this proceeding by the Petitioner, has successfully convinced the Chancellor of the Craighead County Chancery Court that sod farmers are entitled to claim the benefits of the exemption provisions for the sale of "raw farm products" sold directly from the farm for the sale of their sod. See *Boyd v. Pledger*, Craighead Chancery Court, Docket No. 89-1153, Appendix D, *infra*, 22a. The decision in the *Boyd* case is now on appeal to the Arkansas Supreme Court by the Respondent.

REASONS FOR GRANTING THE PETITION

Petitioner submits that the Arkansas Supreme Court's interpretation of the Arkansas Tax Procedure Act, so as to deny him any type of right to a post-deprivation judicial hearing on his claim of tax exemption, violates his rights to the due process of the laws, as provided to him by the Fourteenth Amendment of the United States Constitution, *supra*. The Petitioner alleges that this decision by the Arkansas court refuses to follow to precedential decisions of this Court, and, therefore, this petition presents a case where the Petition should be granted under the provisions of Rule 10.1(c).

The Arkansas court's interpretation in this case of Arkansas' constitutional and statutory tax procedure provisions, which provisions have been interpreted

to require this taxpayer to make *full payment* of all amounts assessed by the Respondent for *all* 72 separate taxable periods (over a six-year period of time) before he can secure a judicial review of the taxing authority's actions in making the assessment, causes this State's tax procedure scheme to deny this taxpayer his constitutional right to due process. This taxpayer has fully paid 13 separate months of the assessed liabilities "under protest," and he must be provided a reasonable "opportunity to contest the validity of this tax" in a post-deprivation judicial proceeding for the tax procedure scheme to pass constitutional muster. A simple answer to this constitutional dilemma is that this Court should rule that the "divisible" payment rule applies to state excise taxes (as it does to federal excise taxes) and the Arkansas tax procedure system, as it now exists, will meet the due process requirements of the Fourteenth Amendment.

The Petitioner acknowledges that the Respondent, as an agent of the sovereign State of Arkansas, has a right to seek the payment of a disputed tax assessment (even to impose summary methods for the collection of the disputed tax) before the taxpayer has a right to seek a judicial review of the merits of such assessment. *Dodge v. Osborn*, 240 U.S. 118 (1916). However, this Court, and a number of other appellate courts of Arkansas' sister states, have held that a taxpayer's due process rights are violated, unless he is afforded an adequate and reasonable post-deprivation judicial hearing in which he can contest the taxing authority's determination. See, *Central of Georgia Railroad Co. v. Wright*, 207 U.S. 127, 28 S.Ct. 47 (1907), and *Arthur Treacher's Fish & Chips, Inc. v. New York State Tax Commission*, 419 N.Y.S.2d 768

(1979). No injunction will issue against the collection of a state tax, unless the taxpayer has no adequate remedy at law. The Petitioner submits that the interpretation of Arkansas' tax procedure scheme, as interpreted by the state supreme court here, has, indeed, left him without an adequate post-deprivation remedy at law where he can contest the Respondent's assessment.

I.

WHERE A TAXPAYER HAS PAID A RETROACTIVE DEFICIENCY ASSESSMENT OF A DIVISIBLE STATE EXCISE TAX FOR THE AMOUNT OF SUCH STATE TAX ATTRIBUTABLE TO ONE COMPLETED TRANSACTION, OR ALL SUCH EXCISE TAXES FOR AT LEAST ONE REPORTING PERIOD, HIS RIGHT TO DUE PROCESS OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT IS DENIED, IF HE IS PROHIBITED FROM SECURING A SPEEDY POST-DEPRIVATION JUDICIAL HEARING TO DETERMINE HIS PROPERTY RIGHTS TO THE MONEYS PAID BY HIM UNDER DURESS OR PROTEST.

Over thirty years ago (in a case like the case at bar where a taxpayer could not seek pre-deprivation judicial review of his disputed tax liability by going to the United States Tax Court), this Court held that the taxpayer who had been assessed a divisible excise tax by the taxing authority had the right to go into the United States District Court and, through a suit for refund, seek to recover the partial payment of this assessed excise tax. See, *Flora v. United States*, 362 U.S. 145, 175, fn. 37-38, 80 S.Ct. 630, 645-646, fn. 37-38.

The Petitioner herein submits that his federal constitutional rights to the due process of the laws, pursuant to the provisions of the Fourteenth Amend-

ment, should be interpreted so as to allow him the right to seek a judicial determination of whether or not he owes the state Sales (excise) Taxes in dispute in this case. Mr. Taber, like the taxpayers noted in footnotes 37 and 38 of *Flora*, has made partial payment of the total amounts of Sales Taxes assessed by the Respondent by fully paying "under protest" 13 separate months of the Sales Tax assessments in question. Therefore, the Petitioner submits that the due process of the laws requires that he be allowed to contest these partial payments of the divisible state Sales Taxes, as he would be allowed to so contest a similar federal excise tax in the federal taxing system by making a partial payment and then suing for refund. The Petitioner submits that the due process clause requires such a holding, specifically where the assessment of the excise tax is on a retroactive basis and where the vendor-collector has no opportunity to protect himself from liability by passing the Sales Tax along to his customers.

Only recently, this Court in a much awaited decision that passed upon the merits of a state taxpayer's federal due process rights in contesting a state tax assessment in a post-deprivation judicial hearing, specifically held:

> In the end, the State's post-deprivation procedure would provide Petitioner with all the process it is due: *an opportunity to contest the validity of the tax* and a 'clear and certain remedy designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property.'

McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, — U.S. —, 110 S.Ct. 2238, 2252 (1990).

In the *McKesson* case, this Court was chiefly concerned with confirming the taxpayer's federal due process right to the "remedy" phase of the post-deprivation hearing in state court, not the "opportunity to contest the validity of the tax." In *McKesson*, this Court seems to have assumed this "opportunity to contest" would be provided by the state's tax procedure. However, it is this first right, the right of the taxpayer to have an "opportunity to contest the validity of the tax" in a post-deprivation situation (where the contested tax is paid either under duress or under protest) that the Petitioner submits has been denied to him by the decision of the Arkansas Supreme Court in this case.

The taxpayer in this matter acknowledges that the common law and the decisions of this Court have consistently held that the sovereign is entitled to collect his tax claim from the taxpayer-citizen, even through the utilization of summary methods of collection, and that the taxpayer-citizen has no right to seek an injunction or a declaratory judgment before such tax is collected, where the taxpayer has an adequate post-deprivation remedy at law. *Bob Jones University v. Simon*, 416 U.S. 725, 94 S.Ct. 2038 (1974); *Bull v. United States*, 295 U.S. 247, 55 S.Ct. 695 (1935); *Phillips v. Commissioner*, 283 U.S. 589, 51 S.Ct. 695 (1935); *Dodge v. Osborn*, 240 U.S. 118, 36 S.Ct. 275 (1916); and *Arkansas Building & Loan Association v. Madden*, 175 U.S. 269, 20 S.Ct. 119 (1899).

However, here, the Petitioner submits that the

State of Arkansas will never collect any more moneys from him for the 13 separate taxable periods that he has paid "under protest" than has already been collected and that there is no logical reason why he cannot seek a refund of those moneys in this action before he is required to pay the full amount assessed against him by the Respondent for the other 59 separate taxable periods in question. The Petitioner submits that he would not be required to pay additional amounts if he were contesting a federal excise tax before he could secure a judicial review of the substantive issues involved in the dispute. Therefore, the Petitioner submits that the due process clause requires that he have the same rights in contesting a similar state excise tax.

Under virtually identical conditions, this Court held, in *Flora, supra,* that the taxpayer had the right to sue to recover any part of a divisible excise tax, without the full payment of all of the excise taxes assessed for an examination period or periods. The logic behind this exemption to the general "full payment" rule is because—

> excise tax assessments may be divisible into a tax on each transaction or event, so that the "full payment" rule would probably require no more than payment of a small amount.

362 U.S. at 176, fn. 37-38. The United States Courts of Appeals and the United States District Courts have consistently recognized this exception to the "full payment" rule where the taxpayers are seeking to contest "divisible " payroll or excise taxes. See, e.g. *Steele v.*

United States, 280 F.2d 89 (C.A.8, 1960); *Boynton v. United States*, 566 F.2d 50 (C.A.9, 1977); *Jones v. Fox*, 162 F.Supp. 449 (D.C. Md., 1957) and *Christie v. United States*, 179 F.Supp. 709 (D.C. Or., 1959).

The Petitioner submits that his due process rights under the Fourteenth Amendment for contesting a state-imposed excise tax should not be any less than those he could assert (under the Fifth Amendment) if he were contesting an attempt by the Internal Revenue Service to assess a federal excise tax against him. Therefore, the Petitioner prays that the Court will grant his petition in this case for the purpose of clarifying that his due process rights are the same for both federal and state tax law procedure purposes.

II.

THE DECISION OF THE ARKANSAS SUPREME COURT IN THIS CASE MUST BE REVERSED BECAUSE IT CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT REGARDING THE DUE PROCESS RIGHTS THAT STATES MUST AFFORD THEIR TAXPAYER-CITIZENS TO PROVIDE FOR POST-DEPRIVATION JUDICIAL REVIEW OF CONTESTED STATE TAXES PAID UNDER DURESS.

Where the sovereign has taken a contested tax from the citizen-taxpayer, either under duress or where the payment has been made "under protest," then, at common law, the taxpayer had a right to sue in a court of law on a *writ of assumpsit* for money had and received, in an attempt to recover the disputed tax from the sovereign. Where such payments were not made voluntarily by the taxpayer, but were made under compulsion, this Court has always held that there was no statutory author-

ity needed to enable or require the taxing authority to refund the disputed moneys, if the taxpayer was successful in his claim. See, *Ward v. Board of County Commissioners*, 253 U.S. 17, 40 S.Ct. 419 (1920).

Similarly, where a state's tax procedure did *not* entitle the taxpayer to an adequate post-deprivation judicial hearing, this Court has held that the taxing authority may even be enjoined from collecting the disputed tax, because the taxpayer has no adequate remedy at law. See, *Central of Georgia Railway Co. v. Wright*, 207 U.S. 127, 28 S.Ct. 47 (1907), and *Davidson v. Board of Administrators in New Orleans*, 96 U.S. 97, 104-105 (1878).

The interpretation of Arkansas' constitutional and statutory scheme of tax procedure by the Arkansas Supreme Court in this case has, as a "practical matter," effectively precluded the Petitioner from securing an independent and objective post-deprivation judicial review or determination of his disputed Sales Tax liabilities to the State. The State of Arkansas doggedly asserts that the State's interests will not be protected unless *full payment* of all Sales Taxes demanded by the Respondent for *all* 72 separate taxable periods is made by the Petitioner, before he sues to recover any of the Sales Taxes he has already paid "under protest." Because of this taxpayer's truly disadvantaged economic status at this time, it is not a practical possibility that, within the foreseeable future, the Petitioner will be able to pay the full amount assessed against him by the Respondent for each of the 72 separate months covered by the audit period.

Thus, the effect of the Arkansas Supreme Court's decision in this case is to deprive Mr. Taber of (1) his property and (2) his constitutional right to the due process of the laws by depriving him of a post-deprivation judicial review of the validity of the Respondent's administrative actions and the substantive determinations the Respondent made regarding the taxpayer's eligibility to claim the benefits of the Sales Tax exemption for the sale "raw farm products" made to consumers directly from the farm. Under the due process requirements of the Fourteenth Amendment, the Respondent may not act as prosecutor, judge and jury (and, in effect, "jailer"), without any judicial oversight. Any system that allows such a situation to exist is clearly unconstitutional. Instead, the Respondent here must be held accountable for his actions before a court of law, if the taxpayer has been deprived of his property (i.e. moneys) under duress. There is no question but that payments by Mr. Taber in this case for the 13 months' worth of Sales Tax assessments were "involuntary" and that they were made under the threat of actual seizure and sale of his property , all of which were actions taken at the Respondent's insistence.

The Petitioner submits that there is no logical reason for the Arkansas Supreme Court to have held that the Arkansas Tax Procedure Act requires the *full payment* of all of the amounts of the Sales Taxes assessed against the Petitioner for *all* 72 separate taxable periods covered by the Respondent's examination, before the taxpayer could have any right to a judicial hearing on the validity of the Respondent's determinations. Under the rationale of the Arkansas Supreme Court's decision in

this case, the taxpayer could not even secure a judicial hearing if he were able to pay the full amount assessed for 71 of the 72 taxable reporting periods, but have one month's assessed liability remaining unpaid.

The Petitioner submits that, since the execution and forced sale provisions of Arkansas Tax procedure statutes (Ark. Code Ann. §26-18-701, Appendix C, *infra*, 18a) do not provide for any right to either a pre- or post-deprivation objective judicial hearing on the contested assessment, the due process provisions of the Fourteenth Amendment require this Court to order the Arkansas court to grant him a hearing on the substantive questions presented by him regarding the validity of the Respondent's actions in making this assessment at least with regard to the amounts the Petitioner has fully paid *under duress* or *under protest* for 13 of the separate taxable periods in suit.

There are 44 states that impose some type of Sales Tax, and these states almost universally require the payment of a contested assessment or the posting of bond *before* taxpayers can seek a judicial review of the taxing authorities' determinations, e.g. *M & B Drilling & Construction Co. v. State Board of Equalization*, 706 P.2d 243 (Wyo. 1985), and *Tar Box v. Tax Commission*, 695 P.2d 342 (Ia., 1984). There are only a few state jurisdictions that provide their taxpayer-citizens any type of equitable injunctive relief in situations like that presented in this case, e.g., *Energy Supply v. Department of State Revenue*, 549 N.E.2d 1110 (Ind., Tax 1990), and *Court Club, Inc. v. McNamara*, 509 So.2d 143 (La. App. Cir.,

1987).[7]

The state that seems to have come the closest to adopting and utilizing the same rationale for contesting excise taxes as this Court did in the *Flora* decision, i.e recognizing the right of a taxpayer to contest a state tax assessment by seeking a refund of a "partial payment" of a state excise tax (e.g. a Sales Tax or Use Tax), is the State of California. This recognition of the due process rights of the contesting taxpayer seems to have been judicially recognized even though California has a specific constitutional prohibition against any injunction being issued against the collection of a tax. See, *Schaffer v. State Board of Education*, 241 P.2d 46 (Cal. App. 3d, 1952), and *Snoozie Shavings v. State Board of Equalization*, 158 Cal. Rept. 866 (Cal. App. 1st, 1979). Though the rationale of these two California intermediate appellate court decisions may have been somewhat limited by the California Supreme Court's subsequent decision in *State Board of Equalization v. Superior Court*, 703 P.2d 1131 (Cal., 1985), even the California Supreme Court seems to indicate that the trial court in the *Superior Court* case would have had subject matter jurisdiction over a partial payment of the state's Sales Tax, *if* the taxpayer had paid the full amount of the deficiency for at least one full separate taxable period (which he did not) and then filed a suit for refund of this amount.

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[7] For a more exhaustive review of the prepayment requirements of the various states' tax procedure provisions, see the compilation set out in the ABA Sales and Use Tax Handbook (1987).

In this case, the taxpayer has paid the full amount of the Sales Taxes, plus interest, that the Respondent has assessed against him for 13 out of the 72 separate taxable periods in suit. The Respondent will never be able to secure any additional payment from the Petitioner for *any* of these 13 separate months because of his assessment. Therefore, under this Court's decisions that have interpreted the due process fights of taxpayers to entitle them to a meaningful post-deprivation judicial hearing on assessed taxes that are paid "under protest." *Ward v. Love County Bd. of Comm.*, 253 U.S. 17, 40 S.Ct. 419 (1920); *AT&SFRR v. O'Conner*, 223 U.S. 280, 32 S.Ct. 216 (1912); *Gaar, Scott & Co. v. Shannon*, 223 U.S. 468, 32 S.Ct. 236 (1912), and *Arkansas Building & Loan Association v. Madden*, 175 U.S. 269, 20 S.Ct. 119 (1899), the Petitioner submits that this Court should grant his Petition for Certiorari. The Court should use this case as the opportunity to clarify the federal constitutional law by stating that the due process requirements of the Fourteenth Amendment require a state that imposes a divisible excise tax (which tax is divisible either into separate transactions or into separate reporting periods) must allow a taxpayer the right to a post-deprivation cause of action to recover a partial payment of the total assessment that has been made retroactively. *If* the amount of such divisible state excise tax paid by the contesting taxpayer, under duress or protest, is sufficient to cover the divisible amount attributable to either (1) one taxable transaction, or (2) to one taxable reporting period, then the contesting taxpayer should be entitled to his day in state court as to such amount, in the same manner as he can have his day in federal court for the partial payment of a federally imposed excise tax.

As in the two above-cited California cases, *Shaffer* and *Snoozie Shavings*, the taxpayer here has exhausted his administrative remedies; he has paid part of the Sales Tax assessment (a full 13 months' worth) "under protest," and his suit for recovery of those Sales Taxes will *not*, in any way, interfere with the Respondent's right to proceed, either in a collection suit or through even summary proceedings, in an attempt to collect the balance of the assessments for the 59 taxable periods in question. However, as with a similar federal excise tax that is contested by way of a partial payment, a decision regarding the merits of the taxpayer's attempt to recover his partial payment of the total assessment (if the taxpayer is successful in establishing his entitlement to the exemption) may well have a collateral estoppel effect upon the taxing authority's attempt to collect the balance of the unpaid assessment for the other separate taxable reporting months of the audit period.

The Petitioner submits that the procedural issue presented by his Petition in this case is one of growing importance, as the state taxing jurisdictions are assuming a more aggressive taxing stance with regard to Sales and Use Taxes, principally because the states are desperately seeking more funding as federal revenue sharing programs are withdrawn and the states must pay their own way. This is an important question of federal constitutional interpretation that has previously been addressed by this Court on the federal level (in a manner favorable to the legal position sought to be established by the Petitioner here), but has never been addressed as to its application on the state level.

This Court merely assumed that the state tax procedure would afford the taxpayer an adequate "opportunity to contest the validity of the tax" in its recent *McKesson* decision, and the Court's opinion in *McKesson* dealt exclusively witht he federally guaranteed remedy phase of what is guaranteed to a contesting taxpayer under the due processclause of the Fourteenth Amendment. The Petitioner submits that certiorari should be granted in this case so that the Court can address this "first" part of the due process guarantees when a state excise tax is in dispute. This is a legal issue that has never been addressed by this Court with regard to the taxpayer's due process rights under state law.

The Petitioner submits that there is no logical reason for a different basic constitutional standard to be applied to state and federal tax procedures in this regard. Therefore, this Court should grant this Petition for Certiorari and render a decision clarifying the extent and nature of the federal due process rights a taxpayer has to a speedy and meaningful "opportunity to contest the validity of the tax" in a post-deprivation judicial proceeding that involves a state excise tax.

Accordingly, the Petitioner submits that this Court should grant his Petition for Certiorari for the purpose of setting a precedent that will be applicable to all taxpayers, whether they are wealthy or economically disadvantaged (as is Mr. Taber), so as to imbue to each one an equal right to enjoy the due process of the laws with regard to the contesting of a retroactive assessment of a sales tax (or any other excise tax) imposed and administered by a state taxing authority.

CONCLUSION

For the above-stated reasons, the Petitioner submits that his Petition for Certiorari to the Arkansas Supreme Court should be granted so that this Court can take the opportunity to clarify the federal due process rights of state taxpayers to have an adequate and meaningful "opportunity to contest the validity of the tax" in a post-deprivation judicial proceeding.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

SUPREME COURT OF ARKANSAS
No. 89-353

Opinion delivered: Jun. 18, 1990

BILL TABER, d/b/a
TABER'S GRASS FARM
Appellant
v.

JAMES C. PLEDGER,
DIRECTOR ARKANSAS
DEPARTMENT OF FINANCE
AND ADMINISTRATION
Appellee

Appeal from Pulaski
County Chancery Court,
Fifth Division 89-681

Hon. Ellen B. Brantly,
Chancellor

Affirmed

DAVID NEWBERN, Associate Justice

This is a gross receipts tax case in which the principal question is whether the taxpayer must pay all of an assessed deficiency before he becomes eligible to file suit for a refund. Appellant Bill Taber contends the tax should be regarded as divisible so that, if he has paid some of the deficiency declared by the commissioner for each month, or if he has paid all of the deficiency for any month for which the deficiency was assessed, he can bring a suit in chancery court to determine whether any tax should have been assessed. He also contends the assessment constitutes an illegal exaction and violates the common law and his right to due process of law. The commissioner argues the entire assessment must be paid before the chancery court has jurisdiction to rule on a refund claim. We decline to adopt a divisible tax position contrary to a statute requiring full payment or posting a bond as a prerequisite to suit. We find the tax is not an illegal tax, thus

there is no illegal exaction, and whatever common law right Taber may have had has been changed by legislation. Nor has Taber sustained his contention that his right to due process of law has been violated. The chancellor's decision to dismiss the complaint for failure to state facts upon which a claim for relief can be granted is affirmed.

Taber grows sod. For years he sold it only from his farm. He sold some on a retail basis and some to dealers for resale. He thought his retail sales exempt from sales tax under Ark. Code Ann. § 26-52-401(18)(C) (Supp. 1989) which exempts gross receipts from the sale of raw produce from the farm where the sale is made direct from the producer to the customer. He thought his sales to retailers exempt under § 26-52-401(12)(A) (Supp. 1989) which exempts proceeds from sales for resale.

In 1986, Taber decided to open a selling outlet on rented property away from his farm. Realizing that such sales would te taxable, he applied for a permit. An audit of his business was conducted, and it was determined that Taber owed gross receipts taxes for the period September 1, 1980, to August 31, 1986, with respect to his retail sales. Taber sought, without success, to have the decision revised. A hearing was held by the Arkansas Department of Finance and Administration Board of Hearings and Appeals. The commissioner, upon timely request, refused to abate or revise the decision, and a final deficiency assessment was levied August 23, 1988, in the amount of $26,048.66, including interest. A writ of execution against Taber's property to collect the deficiency was issued in December, 1988.

In an effort to comply with Ark. Code Ann. § 26-18-406(2) (1987), Taber attempted to file a bond in the amount of twice the assessment which would have permitted him to bring suit within 30 days after the filing of the bond to have the commissioner's decision set aside. The bond he tendered was a property bond, and the director found it unsatisfactory and refused to accept it, as he was authorized to do. Ark. Code Ann. § 26-18-304 (1987). Taber

was financially unable to post a corporate or cash surety bond.

Under threat of execution, Taber paid $360.00 to the commissioner, asking that $5.00 be allocated to each of the 72 months comprising the deficiency period, and filed suit for a refund of the money. A temporary restraining order was issued. Thereafter, Taber paid further, designating the payment as payment in full for some 13 specified months in the years covered by the assessment.

Four theories were asserted by Taber in the chancery court. He contended he was entitled to a refund (1) pursuant to § 26-18-406, which permits an action to be brought to overturn the final decision of a hearing officer upholding a deficiency assessment, (2) pursuant to § 26-52-507, which permits an action for a tax overpayment, (3) pursuant to Ark. Const. art. 16 § 13, authorizing an action to prevent an illegal exaction, and (4) pursuant to taxpayers' rights at common law. The chancellor rejected the theories offered, said she lacked jurisdiction of the claim, and dismissed the complaint, without prejudice.

1. Return of payment, § 26-18-406

The federal tax system permits a taxpayer who had paid a divisible portion of an excise tax to seek judicial relief from the assessment pursuant to which the payment was made. Taber cites *Jones v. Fox*, 162 F.Supp. 449 (1958), as exemplary of cases invoking the divisible excise tax principle. It is also mentioned in *Flora v. United States*, 362 U.S. 145, 175, n. 38 (1959). The theory behind distinguishing excise from income taxes, and for permitting divisibility with respect to the latter but not the former, is that an excise tax is usually payable upon a transaction or for a short period which can be divided from other transactions or periods. Income taxes, on the other hand, are more complicated, and must take into account deductions as well as exemptions.

Taber's contention is that the Arkansas tax scheme was modeled on the federal tax scheme, and we should therefore implement the division principle. He concedes, however, that there is no federal statute like § 26-18-406(d) which states that § 26-18-406 provides the "exclusive method for seeking relief from a written decision of the director establishing a deficiency in tax." The "method" is the posting of a bond, as discussed above, or payment under protest of the deficiency plus penalty and interest and filing suit within one year.

The fact that Ark. Code Ann. § 26-18-204(e) (1987) states that a "taxpayer *may* seek relief" under § 26-18-406 takes nothing away from the clarify of the exclusivility language of § 26-18-406. Nor does the fact that the second sentence of § 26-18-406(d) states that there shall be no injunctive relief against assessment or collection. It gives the taxpayer the exclusive method of challenge.

In view of the clear statutory provision of the "exclusive" remedy for challenging a deficiency assessment, was have no authority to invoke the divisible tax scheme.

2. Overpayment, § 26-52-507

Section 26-52-507(a) provides:

Any taxpayer who has paid any state tax to the State of Arkansas, through error of fact, computation, or mistake of law, in excess of the taxes lawfully due shall, subject to the requirements of this chapter, be refunded the overpayment of the tax determined by the director to be erroneously paid upon the filing of an amended return or a verified claim for refund.

Taber filed for a refund, following the procedure outlined in subsequent subsections of this statute, and it was denied. He reasserts his divisible tax argument with

respect to this section, contending that each of the payments he made was an overpayment because no tax was due. We do not consider this section to apply in this case. It deals with a taxpayer's overpayment through "error of fact, computation, or mistake of law." Taber paid under protest rather than through error. We have no doubt that his remedies fell under § 26-18-406, not § 26-18-507.

3. Illegal exaction

Article 16, § 13, of the Arkansas Constitution provides: "Any citizen of any county, city or town may institute suit in behalf of himself and all others interested, to protect the inhabitants thereof against the enforcement of any illegal exaction whatever." Taber contends this provision gave the court jurisdiction to entertain his claim. It is argued that this case is like *McCarroll v. Gregory-Robinson-Speas, Inc.*, 198 Ark. 235, 129 S.W.2d 254 (1939), where we held the chancellor had jurisdiction of an illegal assessment.

In the *McCarroll* case we held the chancellor had jurisdiction to entertain an illegal exaction where it was alleged, and the chancellor held, that the Arkansas income tax was void to the extent it was to be applied to money earned by vinegar making plants operated by the taxpayer outside Arkansas. There it was alleged, and held, that the statute creating the tax was unconstitutional. An illegal exaction suit was held to be appropriate, and it was held that the taxpayer could not be limited to the procedures allowed by the tax act to challenge the assessment. We find a suit to declare a tax statute unconstitutional, and therefore void, to be different from a suit to determine whether the taxpayer's transactions fall within an exemption created by the statute. We cannot agree that the *McCarroll* case gives chancellors jurisdiction to hold that the procedural requirements of the tax law do not apply when there is no allegation that the basic tax statute is void.

The same is true of *Harrison v. Norton*, 104 Ark. 16, 148 S.W. 497 (1912), cited as a "see also" case by Taber. There, the chancellor was held to have jurisdiction of an illegal exaction suit where a county road tax was challenged because the results of the election which had resulted in the tax had allegedly been improperly reported. Again, there was a challenge to the validity of the underlying tax law.

The remaining case cited in the part of Taber's brief dealing with the illegal exaction point is *Samples v. Grady*, 207 Ark. 724, 182 S.W.2d 857 (1944). We held that a taxpayer is not bound by a statutory provision requiring posting a bond where the suit is for an illegal exaction against the collector for misuse of taxes which have been collected.

The commissioner contends the illegal exaction provision has been held to apply only to an "illegal tax" or an illegal use of funds, citing *Starnes v. Sadler*, 237 Ark. 325, 372 S.W.2d 585 (1963).

The *Starnes* case held only that art. 16 § 13, conferred jurisdiction on the chancellor to enjoin members of the general assembly from holding other state offices. In *Obiter dicta* the court stated that the provision applied to an illegal tax and to the misappropriation or misuse of state funds.

In his reply brief, Taber responds with reference to *Hardin v. Gautney*, 204 Ark. 723, 164 S.W.2d 427 (1942), where we held that a chancery court had jurisdiction to determine whether a "transaction" should not be taxable. That case, however, was based on a specific statute giving the court jurisdiction. Act 386 of 1941, § 10. That provision was repealed by Act 401 of 1979, § 48(c).

We cannot hold the chancellor erred in declining to find Taber's complaint stated a claim for illegal exaction.

4. Common law and due process

Taber's final segment of argument is that the common law affords a remedy to a taxpayer to recover involuntarily paid taxes and that to deny him this relief as well as illegal exaction relief and to deny his arguments for divisibility of the tax under the tax scheme is to deny him due process of law.

Exemplary of cases cited for the common law right to return to an involuntarily paid tax is *City of Little Rock v. Cash*, 277 Ark. 494, 644 S.W.2d 229 (1982). That was an illegal exaction case where we contrasted a payment made by a taxpayer voluntarily. We held the city had created an illegal exaction by allowing a charge to be made to water consumers without authority. We were not dealing with a statute controlling the method by which an assessment could be challenged.

The general assembly has obviously altered the common law with the enactment of § 26-18-406, discussed above, which provides the exclusive method for challenging a deficiency determination. This leaves us with the due process argument.

During oral argument counsel for the commissioner correctly pointed out that in this case we are considering whether the chancellor erred in holding that the complaint failed to state facts upon which a claim for relief could be granted. The due process argument was included in the county of the complaint dealing with § 26-18-507 only, and it is doubtful that the chancellor was given the opportunity to consider the full range of the due process argument being made on appeal. We cannot ascertain that from Taber's appendix.

Be that as it may, Taber has been unable to cite one case where it was held that a statute requiring either posting a bond or full payment before challenge of a tax is

unconstitutional. We are sensitive to and fully appreciative of Taber's conclusion that, with respect to a taxpayer who can neither make full payment nor post the required bond, the commissioner has "confiscatory" power. In this case it will mean that the commissioner may be able to foreclose his lien on Taber's property with no judicial review of Taber's claim of exemption.

At first blush, it sounds as if a court should be able to come up with a remedy for a taxpayer in that position, but that ignores the other side of the coin which is well illustrated in Mister Chief Justice Warren's opinion in *Flora v. United States, supra:*

> A word should also be said about the argument that requiring taxpayers to pay the full assessments before bringing suits will subject some of them to great hardship. This contention seems to ignore entirely the right of the taxpayer to appeal the deficiency to the Tax Court without paying a cent. If he permits his time for filing such an appeal to expire, he can hardly complain that he has been unjustly treated, for he is in precisely the same position as any other person who is barred by a statute of limitations. On the other hand, the Government has a substantial interest in protecting the public purse, an interest which would be substantially impaired if a taxpayer could sue in a District Court without paying his tax in full . . . [362 U.S. 175-176, footnotes omitted].

The Supreme Court thus held that judicial review by a court created under Article III of the Constitution of the United States was not available to a taxpayer where Congress had required payment of the tax in full as a prerequisite, and the taxpayer had not complied. While we have no tax court in Arkansas, our law does accord administrative remedies to the taxpayer of which, as reported earlier in this opinion, Taber has taken full advantage.

While we are sympathetic with a taxpayer in Taber's position, we cannot say he has demonstrated that the Due Process Clause entitles him to pursue his claim in a court.

APPENDIX B

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

BILL TABER D/B/A/ TABERS
GRASS FARM — PLAINTIFF

vs. — NO. 89-681

JAMES C. PLEDGER, DIRECTOR
ARKANSAS DEPARTMENT OF FINANCE
AND ADMINISTRATION — DEFENDANT

ORDER

On October 13, 1989, came on for hearing Defendant's Motion to Strike and Motion to Rescind Temporary Restraining Order. Bill Taber, Plaintiff, appeared in person and by counsel, Eugene G. Sayre. Malcolm P. Bobo appeared on behalf of Jim Pledger and the Arkansas Department of Finance and Administration.

Based upon the pleadings filed, the arguments of counsel, and other evidence before the Court, the Court finds:

1. Plaintiff has failed to state a claim upon which relief can be granted.

2. Arkansas Code Annotated § 26-18-406 (1987) provides the exclusive method for seeking judicial relief from a written decision by the Director establishing a deficiency in tax. The requirements of § 26-18-406 must be met for this Court to have subject matter jurisdiction over the matter.

3. Plaintiff has not complied with the § 26-18-406 requirement that the taxpayer either pay the tax, penalty, and interest or post a bond in double the amount of the tax deficiency.

4. Plaintiff has failed to state illegal exaction claim under Article 16, Section 13 of the Arkansas Constitution.

5. The amount of tax, penalty, and interest was established by the assessment and the assessment was sustained by both the Administrative Law Judge of the Board of Hearings and Appeals and the Commissioner of Revenues, Revenue Division, Arkansas Department of Finance and Administration.

6. Plaintiff's argument for a refund pursuant to Arkansas Code Annotated § 26-18-507 is without merit. Section 26-18-507 states that the taxpayer must have paid an amount in excess of the taxes lawfully due before a refund of the "overpayment" will be paid. The assessment established the amount of the taxes lawfully due. Plaintiff has paid only a small percentage of the tax established by the assessment. Therefore, there has been no "overpayment" to be refunded.

7. The Motion to Strike the First Amended Complaint is denied. The request to dismiss the case and rescind the temporary restraining order is granted.

8. Should Plaintiff appeal this decision, upon the posting of a "satisfactory" bond, to be set by the parties, or by the Court if the parties cannot agree, a Stay will be issued to prevent the Arkansas Department of Finance and Administration from executing on Plaintiff's property during the pendency of the appeal.

WHEREFORE, It Is Ordered, Adjudged, and Decreed that this case is dismissed without prejudice and the temporary restraining order is rescinded.

/s/ Ellen B. Brantley

Ellen B. Brantley
Chancellor

10-30-89

Date

APPENDIX C

Selected Portion of the Arkansas Tax Procedure Act (as in effect on January 1, 1990)

26-18-405. Hearing on proposed assessments.

(a)(1) The director shall appoint a hearing officer to review all written protests submitted by taxpayers, hold all hearings, and make written findings as to the applicability of the proposed assessment.

(2) Decisions of the hearing officer shall be final unless revised by the director.

(3) The hearings on written and oral protests and determinations made by the hearing officer shall not be subject to the provisions of the Arkansas Administrative Procedure Act, § 25-15-201 et. seq.

(b) The director may appoint one (1) or more hearing officers, but the persons occupying that appointment shall not contemporaneously with the holding of that appointment have any other administrative duties within the Revenue Division of the Department of Finance and Administration.

(c) The actual hearing on the written protest shall be held in any city in which the Revenue Division maintains a Field Audit District Office or in such other city as the director shall, in his discretion, designate.

(d)(1) The hearing officer shall set the time and place for hearing on the written protests and shall give the taxpayer reasonable notice thereof.

(2) At the hearing, the taxpayer may be represented by an authorized representative and may present evidence in support of his position.

(3) After the hearing, the hearing officer shall render his decision in writing and shall serve copies upon both the taxpayer and the section or division of the Department of Finance and Administration which proposed the assessment.

(4)(A) If the proposed assessment is sustained, in whole or in part, the taxpayer may request in writing, within twenty (20) days of the mailing of the decision, that the director revise the decision of the hearing officer.

(B) If the director refuses to make a revision or if the taxpayer does not make a request for revision, then a final assessment, as provided by § 26-18-401, shall be made upon the final determination of the hearing officer or the director.

(e) A taxpayer may seek relief from the final decision of the hearing officer or the director on a final assessment of a tax deficiency by following the procedure set forth in § 26-18-406.

26-18-406. Judicial relief.

(a) Within thirty (30) days of the issuance of the notice and demand for payment of a deficiency in tax established by a final determination of the hearing officer or the director under § 26-18-405, a taxpayer may seek judicial relief from the final determination by either:

(1) Paying under protest the amount of the deficiency, plus penalty and interest determined by the director to be due, and filing a suit to recover that amount within one (1) year from the date of payment under protest; or

(2)(A) Filing with the director a bond in double the amount of the tax deficiency due and by filing suit within thirty (30) days thereafter to stay the effect of the director's determination.

(B) The bond shall be subject to the condition that the taxpayer shall file suit within thirty (30) days after filing the bond, shall faithfully and diligently prosecute the suit to a final determination, and shall pay any deficiency found by the court to be due and any court cost assessed against him.

(C) A taxpayer's failure to file suit, diligently prosecute the suit, or pay any tax deficiency and court costs, as required by this subsection, shall result in the forfeiture of the bond in the amount of the assessment and assessed court costs.

(b)(1) Jurisdiction for a suit to contest a determination of the director shall be in the Pulaski County Cnancery Court or the chancery court of the county in which the taxpayer resides or has his principal place of business, where the matter shall be tried de novo.

(2) An appeal will lie from the chancery court to the Supreme Court of Arkansas, as in other cases provided by law.

(c)(1) All taxes and penalties under protest shall be held by the Director in a "Tax Protest Fund Account."

(2) The director shall make refunds of the taxes and penalties found by the court to be overpaid by the taxpayer from the Tax Protest Fund Account.

(3) If no suit is instituted by a taxpayer within one (1) year of the date of payment, the director shall pay the amount so held into the appropriate account as provided in § 26-18-308.

(d) The method provided in this section is the exclusive method for seeking relief from a written decision of the director establishing a deficiency in tax. No injunction will issue to stay proceedings for assessment or collection of any taxes levied under any state tax law.

(e)(1) In any court proceeding under this section, the prevailing party may be awarded a judgment for court cost.

(2) A judgment of court costs entered by the court in favor of either party shall be treated, for purposes of this chapter, in the same manner as an overpayment or deficiency of tax, except that no interest or penalty shall be allowed or assessed with respect to any judgment for court costs.

26-18-507. Claims for refunds of overpayments.

(a) Any taxpayer who has paid any state tax to the State of Arkansas, through error of fact, computation, or mistake of law, in excess of the taxes lawfully due shall, subject to the requirements of this chapter, be refunded the overpayment of the tax determined by the director to be erroneously paid upon the filing of an amended return or a verified claim for refund.

(b) The claim shall specify:

(1) The name of the taxpayer;

(2) The time when and the period for which the tax was paid;

(3) The nature and kind of tax paid;

(4) The amount of the tax which the taxpayer claimed was erroneously paid;

(5) The grounds upon which a refund is claimed; and

(6) Any other information relative to the payment as may be prescribed by the director.

(c) The director shall determine what amount of refund, if any, is due as soon as practicable after a claim has been

filed, but in no event shall the taxpayer be entitled to file a suit for refund under subsection (e) of this section until at least six (6) months have elapsed from the date of the filing of the claim for refund.

(d) Notwithstanding any provisions of the law to the contrary, a taxpayer who acts only as an agent of the state in the collection of any state tax shall be entitled to claim a credit or refund of such tax only if the taxpayer establishes that he has:

(1) Borne the tax in question;

(2) Repaid the amount of the tax to the person from whom he collected it; or

(3) Obtained the consent of the person to the allowance of the credit or refund.

(e)(1) The director shall make a written determination and give notice to the taxpayer concerning whether or not a refund is due. If a refund is due, the director shall certify that the claim is to be paid to the taxpayer as provided by law or credited against taxes due or to become due.

(2)(A) The taxpayer may seek judicial relief from:

(i) The written decision of the director which denies the claim in whole or part; or

(ii) The director's failure to issue a written decision after the claim has been filed for six (6) months, by filing any action with the Pulaski County Chancery Court or the chancery court of the county in which the taxpayer resides or has his principal place of business after at least six (6) months have expired from the date of the filing of the claim for refund if the director has not acted on the claim, or within ninety (90) days after issuance of the director's written decision.

(B) A written decision of the director on a refund becomes final and not subject to suit ninety-one (91) days after it is issued to the taxpayer.

26-18-701

Selected Portions of the Arkansas
Gross Receipts [Sales] Tax Act of 1941
(as in effect on January 1, 1990)

26-52-101. Title.

This act shall be known and cited as the "Arkansas Gross Receipts Act of 1941."

* * *

26-52-301. Tax Levied.

There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:

* * *

26-18-701. Issuance of certificates of indebtedness and execution.

(a)(1) If a taxpayer does not timely and properly pursue his remedies seeking relief from a decision of the Director of the Department of Finance and Administration and a final assessment is made against the taxpayer or if the taxpayer fails to pay the deficiency assessed upon notice and demand, then the director shall, as soon as practicable thereafter, issue to the circuit clerk of any county of the state a certificate of indebtedness certifying that the person named therein is indebted to the state for the amount of the tax established by the director as due.

(2) The circuit clerk shall enter immediately upon the circuit court judgment docket:

(A) The name of the delinquent taxpayer;

(B) The amount certified as being due;

(C) The name of the tax; and

(D) The date of entry upon the judgment docket.

(3)(A) The entry of the certificate of indebtedness shall have the same force and effect as the entry of a judgment rendered by the circuit court. This entry shall constitute the state's lien upon the title of any real and personal property of the taxpayer in the county where the certificate of indebtedness is recorded.

(B) This lien is in addition to any other lien existing in favor of the state to secure payment of taxes, applicable interest, penalties, and costs. The lien is superior to other liens of any type or character attaching to the property after the date of entry of the certificate of indebtedness on the judgment docket. This lien is superior to all claims of unsecured creditors.

(C) The certificate of indebtedness authorized by this subsection shall continue in force for ten (10) years from the date of recording and shall automatically expire after the ten-year period has run. Actions on the lien on the certificate of indebtedness shall be commenced within ten (10) years after the date of recording of the certificate, and not afterward. The director shall not be required to file releases on liens which have expired, and the provisions of § 26-18-808 dealing with failure to release liens are not applicable to this section. The provisions of this subsection are applicable to both liens already on file and all future filings of liens.

(b)(1) After entry of the certificate, the circuit clerk shall issue a writ of execution directed to the director, authorizing the director to levy upon and against all real and personal property of the taxpayer.

(2) The director shall have all remedies and may take all proceedings for the collection of the tax which may be taken for the recovery of a judgment at law.

(3) The writ shall be issued, served, and executed in the same manner as provided for in the issuance and service of executions rendered by the circuit courts of this state, except the director shall act in the place of the county sheriffs.

(4) The director shall have this authority for all liens either presently filed or filed after the passage of this act.

(c)(1) Nothing in this chapter shall preclude the director from resorting to any other means provided by law for collecting delinquent taxes.

(2) The issuance of a certificate of indebtedness, entry by the clerk, and levy of execution as provided in this section shall not constitute an election of remedies with respect to the collection of the tax.

(3) The taxes, fees, interest, and penalties imposed or levied by any state tax law, when due, may be collected in the same way as a personal debt of the taxpayer.

(4) The director, in the name of the state, may sue to the same effect and extent as for the enforcement of a right of action for debt.

(5) All provisional remedies available in these actions are available to the State of Arkansas in the enforcement of the payment of any state tax.

(d)(1) In addition to the remedies provided in subsections (b) and (c) of this section, the director may direct the circuit clerk to issue a writ of execution directed to the sheriff of any county authorizing the sheriff to levy upon and against all real and personal property of the taxpayer. The writ shall be issued, served, and executed in the same manner as provided for in the issuance and service of executions rendered by the circuit courts of this state.

(2) The circuit clerks and sheriffs shall be entitled to receive the same fees provided by law in these matters. These fees shall be collected from the taxpayer by either the director or the sheriff in addition to the tax, penalties, and interest included in the certificate of indebtedness. If the sheriff is unable, after diligent effort, to collect the tax, interest, penalties, and costs, the director may pay such fees as are properly shown to be due to the clerk and sheriff.

(e) The director may contract with persons inside or outside the state to help the director collect delinquencies of resident or nonresident taxpayers.

APPENDIX D

IN THE CHANCERY COURT
OF CRAIGHEAD COUNTY, ARKANSAS
JONESBORO DISTRICT

COY MAC BOYD, d/b/a
TURF PLANTATION — PLAINTIFF

Filed May 23, 1990

vs. NO. 89-1153

CHARLES D. RAGLAND, REVENUE
COMMISSIONER, REVENUE DIVISION;
STATE OF ARKANSAS,
DEPARTMENT OF FINANCE
AND ADMINISTRATION — DEFENDANT

JUDGMENT

Came the parties on April 25, 1990, the plaintiff appearing in person and with counsel, and the defendant appearing by a representative and its counsel, and after presentation of evidence, argument, submission of briefs and exhibits to the Court, the Court took the case under advisement and by Letter Opinion of May 7, 1990, issued its decision.

Accordingly, it is the judgment and order of the court as follows:

I. *FINDINGS OF FACT*

1. Plaintiff is a dentist and a farmer living in Jonesboro with a farm in Mississippi County. He grows soybeans, cotton, wheat, and sod (Bermuda) produced and grown within the State of Arkansas. He began growing sod in 1984.

2. Plaintiff's sod operation involves 60 acres. He uses the same basic equipment in growing the other crops including tractors, tillers, and cutters (mounted on a row crop tractor). The growing season for sod is similar to that of plaintiff's other crops: he plants the turf in the spring and harvests it in the fall.

3. Plaintiff's customers include landscapers, contractors (home builders) and nurseries. He has no store or office at his farm. He delivers sod directly to customers by trailer-truck for on-site deliveries. Of his sales, 95% are to landscapers, contractors, and nurseries. Five percent are to home owners and golf courses or country clubs.

4. The State Plant Board, under the Arkansas Nursery Fraud Act inspects landscapers, nursery dealers, and nurserymen (growers), but it does not routinely inspect sod farmers. Bermuda sod does not come under its inspection policy as stated by David Blackburn, Plant Board Inspector.

5. The sod grown by plaintiff is not sold for food or fiber. Defendant considers the sale of sod taxable as it is tangible personal property and is not a food or fiber. Defendant's witness, Roberta Overman, on cross examination, conceded that sod could be grown or produced from a farm and that it is a raw product.

6. Defendant assessed plaintiff for the audit period of April 1, 1984, through June 30, 1989, for state and local taxes, penalty, and interest in the amount of $13,782.35 upon the sales of sod which defendant alleges to be subject to the Arkansas Gross Receipts Act. Plaintiff has challenged this application of the Arkansas Gross Receipts Tax to his sales by duly filing this action under Ark. Code Ann. § 26-18-406 (1987).

7. Plaintiff issued a check on Boyd Turf Farms, Check No. 662, dated 9-29-89, payable to defendant in the sum of

$10,327.04, representing the tax plus assessed interest. Defendant negotiated this check in December of 1989.

II. *CONCLUSIONS OF LAW*

1. The Arkansas Gross Receipts Act applies to the sales of tangible personal property (among other things). Ark. Code Ann. § 26-52-301 (Supp. 1989).

2. There is specifically exempted from this tax the gross receipts or gross proceeds derived from the sale of raw products from the farm, orchard, or garden, where the sale is made by the producer of the raw products directly to the consumer and user. Ark. Code Ann. § 26-52-401(18)(C) (Supp. 1989). This exemption is limited to articles grown and produced in the State of Arkansas not sold from an established business other than on the farm. Ark. Code Ann. § 26-52-401(18)(E) and (F)(i) (Supp. 1989). Furthermore, this exemption does not apply to sales by florists and nurserymen. Ark. Code Ann. § 26-52-401(18)(F)(iv) (Supp. 1989).

3. The party claiming an exemption from taxes has the burden of proving his entitlement beyond a reasonable doubt. Any tax exemption provision must be strictly construed against the exemption. Any doubt suggests the exemption should be denied. *Ragland v. General Tire & Rubber Co., Inc.*, 297 Ark. 394, 763 S.W.2d 70 (1989).

4. Defendant has consistently interpreted the Arkansas Gross Receipts Act to apply to the sales of sod. In Defendant's "Regulations" manual of the Arkansas Gross Receipts Act, dated January 1, 1987, Section GR43E states as follows:

> "The term 'agricultural' means operations engaged in for the production of food or fiber."

Thus, defendant limits the exemption in question to raw farm products for food or fiber. Interpretation of a statute by an administrative agency, while not conclusive, is highly persuasive. *Arkansas Contractors Licensing Board v. Butler Construction Co.*, 295 Ark. 223, 748 S.W.2d 129 (1988). The administrative agency construction generally should be clearly wrong before it is overturned. *Walnut Grove School District No. 6 v. County Board of Education*, 204 Ark. 354, 162 S.W.2d (1942).

5. The Arkansas Nursery Fraud Act of 1919, which gives the State Plant Board authority to license nurseries and adopt rules and regulations regulating them, defines "nursery," "nursery stock," and "nurserymen." However, those definitions do not specifically cover the growing of sod.

6. Black's Law Dictionary, Revised Fourth Edition (1968), defines a "farmer" as follows:

> "A cultivator; a husbandman; an agriculturist . . . The word 'farmer' also includes: an individual primarily, bona fide, personally engaged in producing products of the soil . . . one who is devoted to the tillage of the soil . . . "

7. The case of *Hardin v. Vestal*, 204 Ark. 492, 162 S.W.2d 923 (1942), cited by both parties, involved the constitutionality of the Gross Receipts Act as applied to the admitted florist and nurseryman in that case. The case did not involve the issue of a sod grower or producer (nor defined such) and has no application to and is distinguishable from this case.

II. *DECISION*

Based on the foregoing, plaintiff beyond a reasonable doubt, is entitled to the exemption in Ark. Code Ann. § 26-52-401(18)(C) (Supp. 1989). Implicit in this finding is that

the sale of sod, as applied to this case, is the sale of a raw product from the farm directly to the consumer and user grown and produced within the State of Arkansas. The statute does not limit the term "raw product" to food or fiber as interpreted by Defendant. Furthermore, plaintiff in growing, producing, and selling sod from his 60 acres of land is a farmer as to the sale of sod.

The issue as to the assessment and waiver of the $3,455.31 penalty is rendered moot. Plaintiff is entitled to a judgment against defendant in the sum of $10,327.04, plus 10% accrued interest.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that plaintiff is entitled to judgment in the amount of $10,327.04, plus interest at 10% from September 29, 1989, plus costs incurred.

IT IS SO ORDERED.

_____

Ralph Wilson, Jr.
Circuit-Chancery Judge

APPROVED:

BARRETT, WHEATLEY, SMITH & DEACON

By /s/ Paul McNeill
Paul D. McNeill
Attorneys for Plaintiff

/s/ Rick Pruett
Rick L. Pruett
Attorney for Defendant

(2)

No. 90-484

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

BILL TABER
D/B/A TABER'S GRASS FARM ..... *Petitioner*

VS.

JAMES C. PLEDGER, DIRECTOR
ARKANSAS DEPARTMENT OF
FINANCE AND ADMINISTRATION ..... *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTION PRESENTED

DOËS THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION REQUIRE A STATE TO AFFORD A TAXPAYER CONTESTING A TAX ASSESSMENT THE RIGHT TO A POST-DEPRIVATION HEARING IN ADDITION TO A PRE-DEPRIVATION HEARING?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

SUMMARY OF THE ARGUMENT

The basic tenet of the constitutional guarantee to due process is that a person must be afforded an opportunity for a meaningful hearing. The Arkansas Tax Procedure Act protects a taxpayer's right to due process by affording him the opportunity to challenge a tax assessment in an Administrative Law Court prior to paying any of the tax, penalty or interest assessed. Petitioner took full advantage of this opportunity and with counsel presented his case to the Administrative Law Judge, but failed to carry the burden of establishing his entitlement to the claimed exemption.

Only after Respondent filed a tax lien against Petitioner and the Sheriff proceeded to execute upon Petitioner's property did Petitioner seek to appeal the administrative

decision to the Chancery Court of Pulaski County, Arkansas.

To appeal from an adverse administrative decision, within thirty (30) days of the issuance of the resulting notice and demand for payment of the tax deficiency established by the Administrative Law Judge, the taxpayer must either pay the full amount of the assessment, or file with the Director a bond in double the amount of the tax due. Petitioner paid nothing within the thirty-day time limit.

The Supreme Court of Arkansas affirmed the trial court's decision to dismiss the case for lack of subject matter jurisdiction. Petitioner alleges that this decision by the Arkansas Court is in conflict with decisions of this Court, which have held that a post-deprivation hearing is required. Respondent submits that this Court's decisions which have required a post-deprivation hearing involved cases in which the taxpayer was not afforded a pre-deprivation hearing. In the case at bar, taxpayer did in fact have a trial on the merits with the assistance of counsel before an Administrative Law Judge. Accordingly, the Arkansas Supreme Court held that the Arkansas Tax Procedure Act provided sufficient procedural safeguards to satisfy the commands of the Due Process Clause. This decision does not conflict with any decision of another state court of last resort or any federal court decision. Nor does it conflict with any decisions of this Court.

REASONS FOR DENYING THE WRIT

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT REQUIRE A STATE TO AFFORD A TAXPAYER BOTH A PRE-DEPRIVATION HEARING AND A POST-DEPRIVATION HEARING TO CONTEST THE VALIDITY OF A TAX ASSESSMENT.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution does not guarantee a post-deprivation hearing to a taxpayer contesting a tax assessment. The due process clause does guarantee a taxpayer the opportunity to be heard "at a meaningful time and in a meaningful manner." *Matthews v. Eldridge,* 424 U.S. 319, 333, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976); *Armstrong v. Manzo,* 380 U.S. 545, 552, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965). In *Matthews* this Court explained that the due process requirements are directly related to the demands of the particular situation. *Matthews,* 424 U.S. at 335.

This Court has never held that the Due Process Clause requires that a taxpayer be afforded both a pre-deprivation hearing and a post-deprivation hearing to contest a tax assessment. Only recently this Court declared that it is the State's decision whether to provide a pre-deprivation process or a post-deprivation process for allowing a taxpayer to challenge a tax assessment. *McKesson v. Division of Alcoholic Beverages and Tobacco,* 495 U.S. ___ , 110 L.Ed.2d 17, 110 S.Ct. 2238 (1990).

Arkansas has chosen to allow taxpayers to challenge a tax assessment in a pre-deprivation process. The Arkansas Tax Procedure Act provides a taxpayer the opportunity to present his case challenging the proposed assessment of tax at a

hearing before an Administrative Law Judge. Ark. Code Ann. §26-18-404 (1987), Appendix A, infra, 1a. Evidence and testimony are presented by both sides at this hearing, the same as it would be at any other trial. After the hearing, the Administrative Law Judge renders his decision in writing with findings of fact and conclusions of law based upon the evidence presented at trial. Ark. Code Ann. §26-18-405 (1987), Pet. Appendix C, 13a. A taxpayer may appeal an adverse administrative decision to the Chancery Court if, within thirty days of the issuance of the notice and demand for payment of the tax deficiency established by the administrative decision, he either pays under protest the full amount of the assessment determined by the Administrative Law Judge to be due, or files a bond in double the amount of the tax due. Ark. Code Ann. §26-18-406 (1987), Pet. Appendix C, 14a.

Petitioner timely protested the proposed assessment and requested a trial before an Administrative Law Judge. With the assistance of counsel, Petitioner vigorously contested the proposed assessment, arguing that he was entitled to a statutory exemption from sales tax. In April of 1988 the administrative decision was rendered upholding the proposed assessment in its entirety.

On August 23, 1988, a Notice of Final Assessment and Demand for Payment was mailed to the Petitioner. Petitioner failed to perfect an appeal of the administrative decision to the Chancery Court within thirty days of the issuance of the Notice and Demand for Payment.

Only after Respondent filed a Certificate of Indebtedness (tax lien) against Petitioner and the Pulaski County Sheriff served the Petitioner with a Writ of Execution did Petitioner make any attempt to pay any portion of the outstanding tax

liability. On February 13, 1990, the week before the scheduled Sheriff's sale, Petitioner paid "Under Protest" a total of $360.00, less than two percent (2%) of the assessment, to the Respondent and filed suit in the Pulaski County Chancery Court seeking review of the administrative decision. Subsequently, the Petitioner made two additional payments to the Respondent and amended his complaint to include a request for a refund of those payments as well.

The payments made by Petitioner were not only too little, but were also too late. Citing *Dodge v. Osborn*, 240 U.S. 118, 36 S.Ct. 275 (1916), Petitioner acknowledged that the Respondent has a right to seek the payment of a disputed tax assessment before the taxpayer has a right to seek a judicial review of the merits of such assessment. Pet. Brief pg. 15. Also, this Court has acknowledged that a limit may be placed upon the time within which a taxpayer must perfect an appeal of a contested assessment, stating that if the taxpayer "permits his time for filing such an appeal to expire, he can hardly complain that he has been unjustly treated, for he is in precisely the same position as any other person who is barred by a statute of limitations." *Flora v. United States*, 362 U.S. 145, 175, 80 S.Ct. 630 (1960). Both *Dodge* and *Flora* support the Arkansas Supreme Court's decision to affirm the trial court's dismissal of Petitioner's Complaint. However, Respondent submits that since Petitioner's payments were not made within the statutory time for perfecting an appeal, the amount of the payments was irrelevant and Petitioner's "divisible tax" argument was moot.

Subsequent to filing the petition for a Writ of Certiorari, Petitioner's counsel served both this Court and Respondent's counsel with a copy of a very recent decision by the Supreme Court of Iowa, *Schroeder Oil Co. v. Iowa State Department of*

Revenue and Finance, 458 N.W.2d 602 (July 18, 1990), noting that he plans to discuss this case in his Reply Brief. Petitioner asserts that this case supports his contention that he is entitled to a post-deprivation hearing. Respondent submits that the Iowa tax procedure for contesting a tax assessment is so fundamentally different from the Arkansas Tax Procedure Act that no correlation can be drawn between the *Schroeder* case and the case at bar.

The Iowa tax procedure denies a taxpayer the right to a hearing unless he has paid the full amount of the assessment prior to commencement of the case. *Schroeder Oil Co. v. Iowa State Department of Revenue and Finance*, 458 N.W.2d 602, 603 (1990). However, the Arkansas Tax Procedure Act freely allows a taxpayer to request a hearing without paying any of the tax assessed. Unlike the Iowa tax procedure, the Arkansas Tax Procedure Act affords all taxpayers the right to a trial on the merits.

Referring to the taxpayer's right to contest an assessment, the Supreme Court of Iowa stated, "such a right cannot be confined to the affluent taxpayers or to those who can raise bonds in the amount of the dispute." Id. at 604. The Supreme Court of Iowa held that the taxpayer's constitutional right to due process was violated since he was afforded neither a pre-deprivation nor a post-deprivation hearing. The Arkansas Tax Procedure Act avoids the *Schroeder* constitutional problem by providing a taxpayer with the opportunity for a pre-deprivation hearing.

Petitioner argues that the Due Process Clause entitles him to a post-deprivation hearing, regardless of the fact that the Arkansas Tax Procedure Act afforded him a pre-deprivation hearing. Petitioner claims that the Due Process Clause

requires a post-deprivation hearing in all cases. However, this Court has never adopted such a rigid interpretation of the Due Process Clause. As this Court has stated, "Due Process is flexible and calls for such procedural protections as the particular situation demands." *Matthews,* 424 U.S. at 334, [quoting from *Morrissey v. Brewer,* 408 U.S. 471, 481, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972)].

Petitioner requests that his case be viewed solely from the post-deprivation procedural standpoint, and that all of the pre-deprivation procedural safeguards afforded to him be ignored. This Court should not adopt such an isolated and restrictive approach for due process analysis.

To take such a narrow view of the Arkansas Tax Procedure Act would, in effect, deny the existence of the provision that affords a taxpayer the right to a pre-deprivation hearing. Respondent submits that this provision of the Arkansas Tax Procedure Act cannot be ignored, for it is this very provision which satisfies the commands of the Due Process Clause by affording a taxpayer the right to a pre-deprivational trial on the merits. Ark. Code Ann. §26-18-404 (1987), App. A, 1a. In *McKesson,* this Court noted, "The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause. . . ." *McKesson,* 110 L.Ed.2d at 37 fn. 21.

In 1986, the Eighth Circuit Court of Appeals reviewed the Arkansas Tax Procedure Act and found that it does not violate a taxpayer's right to due process. *Ross v. Martin,* 800 Fed. 2d 898 (8th Cir. 1986). The Arkansas Supreme Court's decision in this case is in accordance with that decision as well as the decisions of this Court. There are no decisions by any

state's court of last resort or any Federal Court which contradict the Arkansas Supreme Court's decision in this case.

CONCLUSION

For the above stated reasons, this Court should deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

James C. Pledger
Commissioner of Revenues

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APPENDIX

Arkansas Code Annotated §26-18-404 (1987). **Taxpayer relief.**

(a) Any taxpayer who wishes to seek relief from any proposed assessment of taxes by the director shall follow the procedure provided by this section.

(b)(1) A taxpayer may at his option either request the director to consider his request for relief solely upon written documents furnished by the taxpayer or upon the written documents and any evidence produced by the taxpayer at a hearing.

(2) A taxpayer who requests the director to render his decision based on written documents is not entitled by law to any other administrative hearing prior to the director's rendering of his decision and, if necessary, the issuing of a final assessment and demand for payment or issuing of a certificate of indebtedness.

(c) Within thirty (30) days after the service of notice of the proposed assessment or action, the taxpayer may file with the director a written protest under oath, signed by himself or his authorized agent, setting forth the taxpayer's reasons for opposing the proposed assessment.

(d) The director may, in his discretion, extend the time for filing a protest for any period of time not to exceed an additional ninety-day period.

CERTIFICATE OF SERVICE

I, Malcolm P. Bobo, do hereby certify that I have served true and correct copies of the above and foregoing Brief as provided by Supreme Court Rules 29.3 and 29.5(b) to each of the following, by U.S. Mail, postage prepaid, addressed as follows:

Hon. Ellen B. Brantley
Chancellor
Pulaski County Courthouse
Markham and Spring Streets
Little Rock, AR 72201

Mr. Eugene G. Sayre
Attorney for Petitioner
Jack, Lyon & Jones, P.A.
425 West Capitol Ave.
3400 TCBY Tower
Little Rock, AR 72201

this 17th day of October, 1990.

/s/ Malcolm P. Bobo

No. 90-484

IN THE

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October Term, 1990

BILL TABER, D/B/A
TABER'S GRASS FARM
Petitioner
v.
JAMES C. PLEDGER, DIRECTOR,
ARKANSAS DEPARTMENT OF
FINANCE AND ADMINISTRATION
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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PETITIONER'S REPLY BRIEF

The Petitioner will address separately below the points raised by Respondent Pledger in his Brief in Opposition. The Petitioner will also specifically address the real conflict that now exists between the rationale of the Arkansas Supreme Court's decision in this *Taber* case and that set forth by the Iowa Supreme Court in that court's recent decision in the case of *Schroeder Oil Co. v. Dept. of Rev. & Finance*, 458 N.W.2d 602 (Ia. 1990). The Iowa Supreme Court held, in its *Schroeder Oil* case, that a taxpayer's "federal" Fourteenth Amendment rights to due process were denied to the protesting taxpayer in

that case, because there was a total lack of post-deprivation review available to the taxpayer to contest the state excise tax assessment under Iowa's tax procedure statutes.

1. This Court's recent decision in *McKesson* held that "federal" due process standards require that the states provide either a pre-deprivation hearing or a post-deprivation hearing to the contesting taxpayer. These hearings on the disputed tax assessments must be "judicial reviews," not state tax "administrative reviews."

The Respondent's *only* real argument in opposition to the Petitioner's Petition for Certiorari is that the Petitioner has been afforded a pre-deprivation hearing on the merits, and that he is therefore not also entitled to a post-deprivation hearing on the merits. (Resp. Br. 3-5). The Petitioner submits that the Respondent clearly misrepresents or misinterprets what this Court held was required of states to meet "federal" due process standards in *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 485 U.S. —, 110 S.Ct. 2238 (1990). There, this Court clearly indicated that any pre-deprivation hearing must be a "judicial hearing," as opposed to an "administrative hearing." Therefore, the in-house "administrative review" provided to the Petitioner by the Respondent's agents, under the provisions of the Arkansas Tax Procedure Act (ATPA) (Ark. Code Ann. §26-18-404 and 405) falls woefully short of meeting this Court's mandate that the states must provide taxpayers with a fair

opportunity for a "judicial hearing" within which to contest the validity and legality of the assessed state tax. Mr. Taber has been totally denied his rights to "federal" due process by the State of Arkansas in this contested Sales Tax assessment.

a. A judicial review of a disputed tax assessment is required for a state to meet the "federally" guaranteed rights of due process of the laws.

In *McKesson*, 110 S.Ct. at 2250, this Court held that the states must provide either a pre-deprivation hearing or a post-deprivation hearing to give the protesting taxpayer "a fair opportunity to challenge the accuracy and legal validity of the tax obligation." This Court clearly stated (with regard to the pre-deprivation alternative) that:

> Because the exaction of a tax constitutes deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the requirements of the due process clause. The State may choose to provide a form of 'pre-deprivation process,' for example, *by authorizing taxpayers to bring suit to enjoin imposition of a tax prior to its payment,* or *by allowing payers to withhold payment and then interpose their objections as defenses in a tax enforcement proceeding initiated by the State.* [Emphasis

Supplied]{1}

The "preassessment" or pre-deprivation" administrative review granted to Arkansas taxpayers by the provisions of Ark. Code Ann. §§26-18-404 and 405, though providing taxpayers with some rudimentary procedural due process, it is *not* the type of procedural due process guaranteed to a taxpayer by the Fourteenth Amendment. This "federally" guaranteed right to due process means that the taxpayer is entitled to a "judicial review" of his dispute with the tax administrator, especially in a post-deprivation setting where the tax is contested by the taxpayer.[2] This Court's admonition that taxpayers must be provided a " fair opportunity to challenge the accuracy and legal validity" of the tax assessment, can only be satisfied by a "judicial review" of the actions of the personnel of the Executive Branch; in light of the tax statute adopted by the Legislative Branch; with both other branch's actions being governed by the parameters of

---

[1] The Petitioner submits that this Court clearly indicated in this passage from the McKesson decision that the required "pre-deprivation" hearing process involve either (1) a suit for injunction or declaratory judgment, or (2) a contest in a collection suit by the state. Ark. Code Ann. §26-18-406(d) specifically prohibits a taxpayer from seeking injunctive or declaratory relief in the Arkansas courts. Here, though the Respondent could have initiated a collection suit against Taber, he chose, instead, to use summary methods of collection through levy and distraint processes provided by Ark. Code Ann. §26-18-701. (Petitioner's Pet., App. C, 13a).

[2] The Petitioner has never stopped protesting the assessment in question. Therefore, he has not voluntarily allowed his procedural rights to lapse, notwithstanding any implication to the contrary by the Respondent. (Resp. Br. 4-5).

the U.S. Constitution.[3]

b. The pre-deprivation review afforded the taxpayer by the Arkansas Tax Procedure Act was an administrative review, not a judicial review, and therefore it clearly cannot be "deemed" to have met the "federal" due process requirements.

In his brief in opposition, the Respondent's counsel artfully attempts to clothe the pre-deprivation "administrative hearing" afforded taxpayers under the terms of the ATPA with judicial trappings by using terms such as "a trial on the merits" (Resp. Br. 2); the hearing was in "an Administrative Law Court" (Resp. Br. 1); or the Administrative Law Judge renders his decision in writing with "findings of fact and conclusions of law based upon the evidence presented at trial." (Resp. Br. 4). However, the plain and unvarnished truth is that the pre-deprivation review procedure afforded a contesting Arkansas taxpayer (under the provisions of Ark. Code Ann. §§26-18-404 and 405) is *strictly* an "administrative review" (manned by a member of the Executive Branch of Arkansas' state government). These personnel answer to the ultimate administrator (the Respondent) of the

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[3] See Marbury v. Madison, 1 Cranch 137, 177, 2L.Ed.2d 60 (1803); Baker v. Carr, 369 U.S. 186 at 217 (1962); Powell v. McCormack, 395 U.S. 486, 521 (1969); Nixon v. Administrator of General Services, 433 U.S. 425, 503 (1977); and Northern Pipeline Co. v. Marathon Pipeline Co., 458 U.S. 50, 61-62 (1902).

challenged Sales Taxes;[4] the Arkansas Rules of Evidence are *not* applicable in these hearings; and the hearings are, by their nature, very similar to an informal Appellate Division conference with an IRS representative, under the similar federal tax procedure scheme.

A meaningful type of "pre-deprivation review" that could be afforded a protesting taxpayer would be one where an appeal could be taken by the taxpayer, from the tax administrator's adverse administrative decision, directly into the state court system without the necessity of making payment of the disputed assessment.[5] Such a "pre-deprivation review" would be afforded under Arkansas' general Administrative Procedure Act (Ark. Code Ann. §25-15-212), but the provisions of the ATPA (§26-18-405) specifically exclude tax controversies from being subjected to the provisions or requirements of the Arkansas Administrative Procedures Act.

Finally, in a refund action by a similarly situated Arkansas sod farmer-taxpayer, Coy Mac Boyd (who was financially able to afford to "make full payment" of

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[4] The administrative review is performed by the tax administrators within the Executive Branch of Arkansas' state government, and the final appeal provided by §26-18-405(d)(4) is to the Commissioner of Revenues. In fact, that option was exercised by Taber and denied by the Respondent in this case. The Respondent, in his letter denying the requested revision in the taxpayer's favor, notified Taber that the taxpayer had "exhausted his administrative remedies."

[5] A system similar to the U.S. Tax Court tax procedure in the federal tax procedures system.

the entire amount of Sales Taxes assessed by the Respondent), secured an objective and independent "judicial review" of his claim that his sales of sod qualified for the exemption for the sale of "raw farm products," where the chancellor in the trial found against the Respondent, and, in effect, against the Respondent's Hearing Officer who had previously rendered adverse "administrative decisions" against both Taber and Boyd at this "administrative review" level.[6]

c. Arkansas' Tax Procedure Act provides *only* a post-deprivation basis for judicial review of the Respondent's actions in assessing state taxes.

There are only two ways that a taxpayer contesting an Arkansas state tax may secure a "judicial review" of his dispute with the Respondent under the ATPA. Both of these statutory causes of action, the "protest provision" (§26-18-406) and the "claim for refund"

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[6] See the decision of the Honorable Ralph E. Wilson, Jr., in the case of Coy Mac Boyd, d/b/a Turf Plantation v. Ragland, Commissioner of Revenues, Craighead County Chancery Court Docket No. 89-1153 (Pet. App. D, p. 22a). This case is now pending appeal before the Arkansas Supreme Court in an action styled Pledger v. Boyd, Arkansas Sup. Ct. Docket No. 90-236. However, even if Coy Mac Boyd is successful in defending his right to claim the exemption for the sale of "raw farm products," and the Respondent decides to apply that decision both retroactively and prospectively to all taxpayers (including Taber), such administrative action will not moot the taxpayer's claim of a denial of the "federal" due process of law guaranteed to him by the Fourteenth Amendment, because this procedural defect will remain as long as the Arkansas Supreme Court's decision in Taber v. Pledger remains as the controlling law for the State of Arkansas.

provision (§26-18-507), are available *only* after the disputed tax has been paid. In fact, the decision of the Administrative Hearing Officer in this case is not even binding upon the Respondent, since §26-18-406(b)(1) provides that the entire matter "shall be tried *de novo*" in the Chancery Court.

To rectify the State of Arkansas' denial of Taber's "federal" due process rights under the rationale of this Court's *McKesson* decision,[7] this Court does *not* have to strike down the provisions of either Ark. Code Ann. §§26-18-406 or 507 as being *unconstitutional.* Instead, all this Court has to do is provide that the "divisible tax rule" and the "partial payment exception" to the "full payment rule" (for contesting federal excise taxes under the Fifth Amendment) applies equally under the Fourteenth Amendment to challenges by taxpayers to state excise taxes. Thus, by requiring state courts to follow this Court's mandate on this issue, as set out in *Flora v. United States*, 362 U.S. 145 (1960), the constitutional dilemma can be solved and the "federal" due process rights under either the Fifth or Fourteenth Amendment for all taxpayers contesting excise taxes (whether of a federal or state nature) will be the same.

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[7] A copy of this Court's decision in McKesson was provided to the members of the Arkansas Supreme Court shortly before the oral argument was held in this case in early June of 1990. From a reading of the opinion rendered in the court below, it is obvious that the Arkansas Supreme Court did not recognize or adhere to this Court's reading of the "federal" due process rights guaranteed to Taber under the Fourteenth Amendment.

2. The Iowa Supreme Court, in a post-*McKesson* decision, has rendered a ruling in direct conflict, for federal due process purposes, with the decision of the Arkansas Supreme Court in this *Taber* case.

The Respondent argues (Resp. Br. 5-8) that the State of Iowa's taxing procedures are so different from those provided by the ATPA that the post *McKesson* decision of the Iowa Supreme Court in the case of *Schroeder Oil Co. v. Iowa State Department of Revenues and Finance*, 458 N.W.2d 602 (July 18, 1990), should not be considered as conflicting with the Arkansas Supreme Court's decision in this *Taber* case. Even a cursory examination of the Iowa Supreme Court's decision in *Schroeder Oil* will be sufficient to negate and reject the Respondent's arguments in this regard.

Specifically, the Iowa Supreme Court in *Schroeder Oil* found that there was absolutely no "federal" due process requirement that a taxpayer be given a pre-deprivation review of the contested tax. However, the Iowa Supreme Court correctly held that the Fourteenth Amendment requires that the contesting taxpayer be entitled to a post-deprivation hearing. The Iowa court also held that the requirement for (1) "full payment," or (2) the posting of a bond, denied the taxpayer in that case his "federal" due process rights. The factual situation in the *Schroeder Oil* case is virtually on all fours with that presented in this *Taber* case. Therefore, the Petitioner submits that there is now an additional reason for grant-

ing his Petition for Certiorari, under the provisions of Rule 10.1(b) of the Rules of this Court, i.e., there is a conflict between the courts of last resort in Arkansas and Iowa over this "federal" question.[8]

CONCLUSION

For the reasons set forth above, the Petitioner submits that his Petition for Certiorari to the Arkansas Supreme Court should be granted, so that this Court may settle a real conflict that presently exists between the highest appellate courts of Arkansas and at least one other state (and certain decisions of this Court) regarding this important "federal" constitutional question of state tax procedure.

October 31, 1990.

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8. Besides the prior decisions of this Court that the Petitioner cited in his Petition as being in conflict with the Arkansas Supreme Court's decision in the instant case, Petitioner also cites to this Court's decisions in Laing v. United States, 423 U.S. 161 (1976), and Commissioner v. Shapiro, 424 U.S. 614 (1976), as further authority for the position that his "federal" due process rights entitle him to an objective and independent "judicial review" of this dispute with the Respondent and his agents.